DOCUMENT RESUME

ED 199 843 EA 013 341

AUTHOR	Harward, Lucy E.; Hoetker, James
TITLE	A Brief Review of Recent Court Decisions Related to the Use of Examinations for Purposes of Making Personnel Decisions. An Addendum to the Materials Prepared for the Writing Subtest of the Florida Teacher Competency Examination.
SPONS AGENCY	Florida State Dept. of Education, Tallahassee.
PUB DATE	1 Aug 79
CONTRACT	790193
NOTE	18p.
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Civil Rights Legislation; Court Litigation; *Employment Qualifications; Equal Opportunities (Jobs); *Occupational Tests; *Personnel Evaluation; Racial Discrimination; Teacher Certification; *Teacher Evaluation; Teacher Promotion; Teacher Selection
IDENTIFIERS	Graduate Record Examinations

ABSTRACT

Recent court decisions provide legal guidelines for the construction of teacher qualification tests. Such tests have often led to the rejection of a disproportionally large percentage of minority applicants. Boards of education have the right to establish tests and other standards pertaining to teacher employment. It is unlawful, however, for an employer to limit, segregate, or classify employees in a manner that adversely affects them because of race. Employment tests must be job related, with cutoff scores that do not discriminate against minorites. Essay examinations that are subjectively graded are legally permissable. Teacher certification tests may be developed and used for the purpose of teacher personnel decisons. (JEH)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED199843

U S DEPARTMENT OF HEALTH,
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

A BRIEF REVIEW OF RECENT COURT DECISIONS RELATED TO THE USE OF EXAMINATIONS FOR PURPOSES OF MAKING PERSONNEL DECISIONS

An Addendum to the Materials Prepared for the Writing Subtest of the Florida Teacher Competency Examination

Lucy E. Harward and James Hoetker

College of Education

Florida State University

Under Contract to the Department of Teacher Education

Florida State Department of Education

#790193

August 1, 1979

EA 013 311

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

L. E. B. Harward

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Any educational officer nowadays who administers a test to help make decisions about certifying or hiring teachers is in between a rock and a hard place. Or, to put it on a more literary plane, he finds himself between the Charybdis of legislators demanding that ill-prepared teachers be screened out and the Scylla of Civil Rights groups demanding that minority teachers be hired in proportion to their numbers. The problem is that, for whatever combination of reasons, most tests of any sort will tend to lead to the rejection of disproportionately large percentage of minority, and especially black, applicants.

All professional licensing bodies, private employers and governmental entities have faced the same cross-pressures for a number of years now, so the question of the legitimacy of tests as a factor in hiring, firing, promotion, or placement has been adjudicated frequently enough that it is possible to identify established ground rules for constructing tests that will pass legal muster.

The following review of recent court decisions--and of pertinent regulations of the Equal Employment Opportunity Commission--was undertaken as a part of the process of developing the writing skills subtest of the Florida Teacher Competency Examination.[1] We wished to determine what precedents existed in law governing such examinations, so that

we could be as certain as possible that the writing test in question conformed in all regards to legal specifications for a valid and defensible instrument.

We want to make it perfectly clear that this is strictly a layman's document. Neither of the authors has had any experience with the law beyond an occasional parking ticket. With the kind assistance of the law librarians at Florida State University, however, we have been able to locate the major cases and decisions that deal directly with testing for employment purposes. From there, we have dealt with the texts of the decisions as interested readers, not as lawyers.

For the sake of easier reading, cases are referred to in the text by abbreviated references to the major parties and by the date of the decision. For instance, BLONDIE v DAGWOOD (1979)[6]. The superscript number refers the reader to a fuller citation in the reference list at the back of the paper. For those who are unfamiliar (as we were) with the conventions of legal references, a guide to reading the citations is included.

In brief, we found in our review that there do exist clear legal guidelines as to what sorts of testing instruments may be used to make employment decisions, and that subjectively-graded essay tests have explicitly been approved as legitimate testing devices in certain circumstances. But we found no court cases specifically speaking to the issue of essay tests used to establish a level of writing skill deemed

prerequisite to employment in teaching or any other trade or profession.

The general principle that boards of education have the right to establish tests and other standards pertaining to teacher employment was recognized in MAGENHEIM v BOARD OF EDUCATION OF RIVERVIEW GARDENS (1961)[2]. The state legislature, the decision states, has charged public school board with the responsibility to "obtain services of best qualified teachers and to adopt rules and regulations to elevate teachers' standards and educational standards." Further, it established that the courts may intervene in such a process only when "the board exercises power in unreasonable, arbitrary, capricious or unlawful manner."

A suit brought in 1965 by a New York City teacher who had failed an examination for department chairman challenged the use of essay questions on the examination because they were subjectively graded. Losing in a lower court, the petitioner demanded copies of model answers for the essay questions for purposes of filing an appeal. She was refused, and the Court later held--in SCHWARTZ v BOARD OF EDUCATION OF THE CITY OF NEW YORK (1965)[3]-that the "board of examiners of city board of education was under no obligation to furnish master or model answers to essay questions or any other part of examination on which denial of license as high school department chairman was based for purpose of assisting applicant on appeal."

SINGLE v JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT (1970)[4], which deals primarily with issues arising from the integration of faculty and students in a number of Southern school districts, addressed the need for establishing realistic and objective criteria for teacher demotion and dismissal.*

GRIGGS v DUKE POWER COMPANY (1971)[8] is significant for its clarification and interpretation of Title VII of the Civil Rights Act of 1964 concerning discrimination in employment.

> 703(a) of the Act makes it an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin.
>
> 703(h) authorizes the use of any professionally developed ability test, provided that is not designed, intended, or used to discriminate....Absent such discriminatory purpose, use of the requirements was permitted, and rejected the claim that because a disproportionate number of Negroes was rendered

---

*Definitions of "realistic and objective criteria" are further provided in the U.S. Government's Equal Employment Opportunity Commission's 1970 "Employee Selection Procedures"[5], which superceded and enlarged the Guidelines on Employment Testing

ineligible for promotion, transfer, or employment, the requirements were unlawful unless shown to be job related. Held:

1. The Act requires the ~~elimiantion of~~ elimination of artificial, arbitrary, and unnecessary barriers to employment that operate invidiously to discriminate on the basis of race, and, if, as here, and employment practice that operates to exclude Negroes cannot be shown to be related to job performance, it is prohibited, notwithstanding the employer's lack of discriminatory intent.

2. The Act does not preclude the use of testing or measuring procedures, but it does proscribe giving then controlling force unless they are demonstrably a reasonable measure of job performance.

ARMSTEAD v STARKVILLE MUNICIPAL SEPARATE SCHOOL DISTRICT (1971)[9] concerns, among other things, a challenge to the use of the Graduate Record Examination by a Mississippi district as a criteria for employment and retention. The Court ruled against the practice on the grounds that an

*(continued) Procedures which it had issued on August 24, 1966. The most recent up-dating of this document, "Uniform Guidelines on Employee Selection Procedures (1978) is recorded in the Federal Register, August 25, 1978.[6] The agencies which issued

> examination which tests an individual's capacity for advanced studies at masters and doctoral level was used in enforcing school board policy requiring in-service teachers and applicants for teaching positions to achieve a certain score on examination or a master's degree as precondition for retention and employment and, as used, classified applicants and in-service personnel on basis of race, defendants did not discharge their very heavy burden of justification in showing an overriding purpose independent of invidious racial discrimination, and school board policy was an unconstitutional racial classification.

The two specific problems dealt with here are (1) the contrast between the abilities ostensibly measured by the GRE and the reasonable requirements for a teaching position, and (2) the arbitrary establishment of cut-off scores required for employment and retention.

This decision was appealed and in ARMSTEAD v STARKVILLE (1972)[10] the Appeals Court upheld the earlier finding of

---

*(Continued) it adopted questions and answers "designed to clarify and provide a common interpretation of the Uniform Guidelines on Employee Selection Procedures."[7] According to these regulations, employment tests must be validated in regard

intent to discrminate but also held that "the school board was entitled to an opportunity to justify" its requirements, possibly indicating an understanding attitude by the Court toward the dilemmas which school boards face in establishing procedures for employment and retention.

The issue of the jobrelatedness of employment tests was raised in definitive form in CHANCE AND MERCADO v THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK (1971)[11]. The decision stated that an examination

> which has defacto effect of discriminating against black and Puerto Rican applicants and which to large extent simply called for regurgitation of memorized material[12] could not be justified possessing required skills and qualifications, and thus....preliminary injunction would issue against conducting of such examinations or promulgating of lists of eligible persons on basis of such examinations.

BAKER v COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT (1971)[13] dealt with the board's using a cut-off score of 1,000 on the National Teacher Examination as a requirement for employment and retention. The ruling "held that use by

---

*(Continued) to all groups likely to be affected in the future. The qualifications to be tested must be demonstrably job-related. There must be no alternative routes by which subjects can fulfill the criteria represented by the test. To be a

Mississippi school district of score of 1,000 on National Teachers Examination as cut-off for retention and employment of teachers within the district was unconstitutional racial classification." This decision, however, depended heavily on evidence that the cut-off score was deliberately established to discriminate.

A California case, WESTERN ADDITION COMMUNITY ORGANIZATION v FRANK N. ALIOTO (1973)[14]

> held that all the law requires is that no minority job applicant or any job applicant, who is otherwise qualified or readily qualifiable to perform a job, shall in effect be excluded from the job by an employment test that goes beyond the actual requirements of the job.

A significant decision was made, concerning licensing tests in general and essay tests in particular, in WHITFIELD v ILLINOIS BOARD OF LAW EXAMINERS (1974)[15]. Whitfield brought a civil rights suit after several times failing the Illinois bar examinations, in part on the grounds that the essay portions of the examination were subjectively graded and unrelated to his ability to practice law.

The Court of Appeals held that, even if the

---

*(continued) legitimate criteria for employment, an instrument must be both valid and appropriate measure or real employment-related performance, and it must not include evaluation of other personal traits or skills.

> plaintiff's background established ability to practice law, fact that bar examination prevented him from practicing was not sufficient reason to declare it violative of Fourteenth Amendment; that, in absence of indication that he had been denied admission for constitutionally impermissable reasons, plaintiff was not entitled to relief on theory that in light of his background, it was impossible for him to have failed a bar examination five times and he must have passed and should be so certified; that fact that essay-type examination required subjective evaluation and that standards of grading were not susceptible to precise definition was not basis for relief and that procedural due process did not require that plaintiff be permitted to see his examination papers and compare them with model answers or answers of successful applicants. (Our emphasis.)

In our untrained opinion, it would seem that this decision speaks clearly and positively to the issues likeliest to be raised in any legal action concerning the results of the writing subtest of the Florida Teacher Competency Examination.

Many other cases have gone through the courts which challenge tests as criteria for employment decisions or

challenge the cut-off scores that have been established for those tests.[16] In general, tests have been upheld as constitutional and non-discriminatory to the degree that the tests were validly related to job performance and that the cut-off scores were neither arbitrarily established nor unrelated to job performance.

Possibly the most far-reaching single case dealing specifically with the use of tests for decisions about teacher employment is UNITED STATES v STATE OF SOUTH CAROLINA (1977)[17]--a case precipitated in part by Educational Testing Service objections to South Carolina's alleged misuse of the National Teacher Examination for employment decisions.

Complainants charged the state with using scores on the NTE for racially discriminatory purposes, by setting various scores which had to be attained for certification and higher salary classifications. A three-judge district court held that

> (1) state use of minimum score requirements on examinations for both certification purposes and as a factor in determining pay did not violate equal protection clause of the Fourteenth Amendment, since there was no discriminatory intent established; (2) the use of such test scores did have a rational relationship with the legitimate employment objectives of state and school districts; (3) the use of the tests, although resulting in a

disproportionately large disqualification of blacks, did not violate Equal Employment Opportunity Act since evidence as to validation was sufficient to establish that the tests were sufficiently trustworthy and defendants met the business necessity test; and (4) there was sufficient evidence to establish the relationship between use of test a factor in determining pay scale and legitimate employment interest.

Clearly, then, according to the Courts, teacher certification tests may be developed and used for purpose of teacher personnel decisions, so long as non-intention to discriminate and the job-relatedness of the test can be established--regardless of the fact that the use of the test may disqualify large numbers of black applicants. Each state and local school board is left on its own to balance the desire to have the best-qualified teachers against the desire--and the legal necessity--to hire and promote minority teachers.

More specifically, what the law and the courts have established is that a test used as a factor in teacher personnel decisions must conform to the following specifications:

1. It must be shown that the test measures job-related performance and only job-related performance;

2. It must be shown that the test is a

required criteria for certification or status, and not an alternative route;

3. It must be shown that the standards are legitimately related to the "business necessities" of the firm or agency using the test;

4. It must be shown that the test has been appropriately validated, as specified in EEOC Guidelines** or in some other manner satisfactory to the Courts;

5. It must be shown that the cut-off scores have been established in an appropriate manner;

6. The test need not consist entirely of objective items, but may rely on subjectively-graded essay responses;

7. There must be no intent to discriminate.

The validity of an examination, and the procedures for establishing that validity, are the problematical areas here; but they boil down, ultimately, to the issue of the equal fairness of the examination to all applicants. The procedures that have been established for devising essay topics for the writing subtest ~~for the writing subtest~~ of

---

**A crucial aspect of the procedures demanded by EEOC is, that an examination by validated on groups such as those who will ultimately be affected by it.

the Florida Teacher Competency Examination are, we would submit, fully adequate to meeting the non-discrimination, job-relatedness, and validation requirements of the legal decisions that have been reviewed (requirements, 1, 3, 4, and 7)[18]. The essay format and scoring procedures have been approved in at least two decisions. By legislative mandate, the examination must be taken and passed by all candidates in order to obtain teacher certification (satisfying 2, above). And the cut-off score on the writing skills subtest is established, not arbitrarily, but by customary practice and by the very nature of the holistic scoring procedures that are used (satisfying 5)[19].

It would seem, again in our legally untrained judgment, that the proposed essay examination of writing skills can meet the requirements for a defensible employment-related test

REFERENCES

When the reference note refers to a Court case, the title (sometimes abbreviated) precedes the citation. Each citation includes (1) the volume, (2) the source, and (3) the number on which the case can be located. For reference number 2, for example, the citation is 347 S.W.2d 409. This is read as volume 347 of the South Western Reporter, 2d Series, page 409.

Source Abbreviations

F.2d	=	Federal Reporter, 2d Series
F.Supp.	=	Federal Supplement
N.Y.S.2d	=	New York Supplement, 2d Series
S.W.2d	=	South Western Reporter, 2d Series
U.S.	=	U.S. Supreme Court Reports

* * * * * * * * * * *

[1] Hoetker, J. "On Writing Essay Topics for Teacher Competency Examinations"; Brossell, G., and Hoetker, J. Examination Handbooks for the Writing Subtest of the Florida Teacher Competency Examination. Tallahassee,FL: State Department of Education, 1979.

[2] Milton D. MAGENHEIM, (Plaintiff) Appellant, v BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF RIVERVIEW GARDENS, ...(Defendants) Respondents. No. 30833. St. Louis Court of Appeals. Missouri. June 14, 1961. Motion for Rehearing or for Transfer to Supreme Court Denied July 11, 1961. 347 S.W.2d 409

[3] Dorothy H. SCHWARTZ, Petitioner, v Isidore BOGEN (and others) constituting the Board of Examiners, Board of Education of the City of New York, Respondents. Supreme Court, Special Term, Kings County, Part I. Dec. 28, 1965. 266 N.Y.S.2d 26

[4] Derek Jerome SINGLETON et al., Appellants, v JACKSON MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Appellees, No. 26285; United States Court of Appeals Fifth Circuit, Dec. 1, 1969. 419 F.2d 1211 (1970)

[5] Title 29--LABOR, Chapter XIV--Equal Employment Opportunity Commission, Part 1607--Guidelines on Employee Selection Procedures, Federal Register, Vol. 35, No. 149, August 1, 1970.

[6] Title 29--LABOR, Chapter XIV--Equal Employment Opportunity Commission, Part 1607--Uniform Guidelines on Employee Selection Procedures (1978). Federal Register, Vol.

43, No. 166, August 25, 1978.

[7] Title 29--LABOR, Chapter XIV--Equal Employment Opportunity Commission, Part 1607--Uniform Guidelines on Employee Selection Procedures (1978). Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures, Federal Register, Vol. 44, March 2, 1979.

[8] GRIGGS et al. v DUKE POWER CO. Certiorari to the United States Court of Appeals for the Fourth Circuit. No. 124. Argued December 14, 1970--Decided March 8, 1971. 401 U.S. 424

[9] Bernice ARMSTEAD et al., Plaintiffs, v STARKVILLE MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants. No. ED 70-51-S. United States District Court. N. D. Mississippi, E. D. April 7, 1971. 325 F.Supp. 560

[10] Bernice ARMSTEAD et al., Plaintiffs-Appelles, v STARKVILLE MUNCIIPAL SEPARATE SCHOOL DISTRICT et al., Defendants-Appelants. No. 71-2124. United States Court of Appeals, Fifth Circuit. June 9, 1972. 461 f.2d 276 (1972)

[11] Boston M. CHANCE, Louis C. Mercado et al., Plaintiffs-Appellees, v THE BOARD OF EXAMINERS, Defendant-Appellant, and The Board of Education of the City of New York et al., Defendants. No. 464, Dcket 71-2021. United States Court of Appeals, Second Circuit. Argued Feb. 15, 1972. Decided April 5, 1972. 458 F.2d 1167 (1972)

[12] Some examples of test items which were used were cited in the margins of the case reference 330 F.Supp. 203, p. 220 as follows:

1961 Examination for Principal, Day Elementary School:

64. Of the following characters in the nursery rhyme, THE BURIAL OF POOR COCK ROBIN, the one who killed Cock Robin is the
1. Lark 2. Thrush 3. Bull 4. Sparrow

1965 Examination for Assistant Principal, Junior High School:

211. I've Got a Little List, from the Mikado is sung by
1. Nanki-Poo 2. Pish-Tush
3. Ko-Ko 4. Pooh-Bah

212. Arthur Sullivan of the team of Gilbert and Sullivan, wrote
1. Gypsy Love Song 2. The Lost Chord

3. Ah, Sweet Mystery of Life
4. A Kiss in the Dark

213. Which one of the following violin makers is NOT of the great triumvirate of Cremona?
1. Amati
2. Stradivarius
3. Guarnerius
4. Maggini

[13] Bettye Joe BAKER et al., Plaintiffs, v COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT et al., Defendants. No. EC 70-52. United States District Court, N. D. Mississippi, E.D., June 23, 1971. 329 F.Supp. 706 (1971)

[14] WESTERN ADDITION COMMUNITY ORGANIZATION et al., Plaintiffs, v FRANK N. ALIOTO et al., Defendants. No. 70 1335 WTS. United States District Court, N.D. California. Nov. 19, 1973. 369 F.Supp. 77 (1973)

[15] LeRoy WHITFIELD, Plaintiff-Appellant, v ILLINOIS BOARD OF LAW EXAMINERS et al., Defendants Len Young Smith, of Appeals, Seventh Circuit. Argued May 24, 1974. Decided Oct. 18, 1974. 504 F.2d 474 (1974)

[16] For example: April 11, 1975, UNITED STATES OF AMERICA v HAZELWOOD SCHOOL DISTRICT, 392 F.Supp. 1976; June 25, 1975, ALBEMARLE PAPER COMPANY and Paperworkers, AFL-CIO v Joseph P. Moody, 95 S.Ct. 2362; January 15, 1976, GEORGIA ASSOCIATION OF EDUCATORS, INC. v JACK P. NIX, Individually and as State Superintendent of Schools, State of Georgia, 407 F. supp. 1102; January 27, 1977, UNITED STATES OF AMERICA v NORTH CAROLINA, 425 F.Supp. 789; July 24, 1978, UNITED STATES OF AMERICA v COMMONWEALTH OF VIRGINIA 454 F.Supp. 1077.

[17] UNITED STATES of America, Plaintiff, and South Carolina Educational Association, et al., v STATE OF SOUTH CAROLINA, et al., Defendants. Civ. A. No. 75--1610. United States District Court, D. South Carolina, Columbia Division. April 14, 1977. Judgment Affirmed Jan. 16, 1978. See 98 S.Ct. 756. 445 F.Supp. 1094 (1977)

[18] Hoetker, Op. cit.

[19] Brossell and Hoetker, op. cit.